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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 713.

CHESTER A. ARTHUR, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

DAVID FOX AND ROSE FOX.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 15, 1881.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between David Fox and Rose Fox, plaintiffs, and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said Chester A. Arthur as by his complaint appear': We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-one, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court the 19' day of September, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] J. M. DEUEL, *Clerk.*

The foregoing writ is hereby allowed, Sept. 19th, 1881.

SAM'L BLATCHFORD.

2 (Indorsed:) 4968. U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against David Fox & ano., defendants in error. Writ of error. S. L. Woodford, attorney for pl'ff in error.

Due service of a copy of the within writ of error is hereby admitted this 20th day of September, 1881.

J. W. LOVE,
Attorney for Defendants in Error.

(Stamp:) U. S. circuit court. Filed Sep. 21, 1881. Joseph M. Deuel, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

3 I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to thirty-three, inclusive, contains a true and complete transcript of the records and proceedings had in said court in the case of Chester A. Arthur, plaintiff in error, against David Fox and Rose Fox, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of October, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

4 *Summons for relief.*

N. Y. supreme court, city and State of New York.

DAVID FOX & ROSE FOX, PLAINTIFF',
vs.
CHESTER A. ARTHUR, NEW YORK COLLECTOR of customs, defendant. } (Cam not served.)

To the defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the supreme court, county of New York, at the court-house, city of New York, and to serve a copy of your answer to the said complaint on the subscriber, at his office, 170 Broadway (room 44), New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated New York, Jan. 9, 1877.

5 CASTNER & LOVE,
Plaintiffs' Attorney'.

(Endorsed:) Fox against Arthur, collector port of New York. Summons. Castner & Love, plaintiffs' attorney', 170 Broadway, New York.

6 The President of the United States of Ameri a to the judges of the supreme court of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit shall be certified of a certain cause, commenced before you against Chester, A. Arthur, defendant, by David Fox & al., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the sixth day of March, 1877, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 20' day of February, in the year one thousand eight hundred and seventy-seven.

[L. S.] JOHN I. DAVENPORT, *Clerk.*

STEWART L. WOODFORD,
U. S. Attorney, Attorney for Defendent.

7 (Indorsed:) 4968. U. S. circuit court. Chester A. Arthur ads. David Fox & al. Copy certiorari. Stewart L. Woodford, U. S. attorney, attorney for defendant.

SIR: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, Feb. 20, 1877.

Yours,

STEWART L. WOODFORD,
U. S. Attorney, Attorney for Defendant.

(Partly erased:) Due service of a copy of the within and of the above notice is hereby admitted.

New York, Feb. 20, 188 .

CASTNER & LOVE,
Plaintiffs' Attorney, 170 *B'w'y.*

8 THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, in the second circuit, of the 28th of March, in the year of our Lord one thousand eight hundred and seventy-seven.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

David Fox and Rose Fox, plaintiffs, in this suit come here into court and by Castner & Love, their attorneys, suggest and give the court now here to understand and be informed that heretofore, to wit, on the ninth day of January last past, an action was commenced in the supreme court of the State of New York, according to the laws of the State of New York and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein upon and for the same cause of action hereinafter set forth, and the
9 summons therein was filed in the clerk's office of the said supreme court on the same day; that the defendant afterwards, by George Bliss, esq., his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards and on the 20th day of February, in the year of our Lord one thousand eight hundred and seventy-seven, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said supreme court did thereupon return the said writ with the summons aforesaid, and did file the same in this court according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

10 Wherefore let the further proceedings and trial in this action against the defendant be continued in this court. And the said plaintiffs accordingly, by Castner & Love, their attorneys, complain of the defendant in this suit being in custody, &c., of a plea of trespass on the case for promises, for that, whereas the said defendant heretofore, to wit, on the day of the date of this declaration, to wit, at the city of New York, in the district aforesaid, was indebted to the said plaintiffs in the sum of

seven thousand dollars, lawful money of the United States of America, for duties on certain merchandise, to wit, certain velours or cow and calf hair goods, imported into and entered at the collection district of the United States for the city of New York, on or about the following date, to wit, January 13th, 1875, in the following ships or vessels, to wit, steamer
11 Russia and steamer City of Montreal, from Heckmondrocck, England, unlawfully demanded, exacted, and received, at the city of New York aforesaid, in the district aforesaid, by the said defendant, then collector of the customs for the district aforesaid, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest in writing in due form of law.

And being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the sum of money above mentioned when he, the said defendant, should be thereunto afterwards requested.

12 And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of two thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant, and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there
13 faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money in this court mentioned when he, the said defendant, should be thereunto afterwards requested.

Nevertheless the said defendant (although often afterwards requested so to do) has not as yet paid the said several sums of money above mentioned or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs of nine thousand dollars; and therefore the said plaintiffs bring suit, &c.

CASTNER & LOVE,
Attorneys for the Plaintiffs.

14 (Endorsed:) U. S. circuit court. David Fox and Rose Fox vs. Chester A. Arthur. Declaration. Castner & Love, pl'ffs' att'ys, 170 Broadway, N. Y.

To STEWART L. WOODFORD, Esq., *Def't's Att'y:*

SIR: Please to take notice that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declara-

tion within 20 days after service of a copy thereof and notice of said rule on his att'y.

NEW YORK, *Ap'l* 2, '77.

CASTNER & LOVE,
170 *B'way, Pl'ffs' Att'ys.*

15 Due service of a copy of within declaration and above notice is hereby admitted this 3 day of April, 1877.

STEWART L. WOODFORD,
U. S. Att'y, Def't's Att'y.

16 United States circuit court, southern district of New York.

DAVID FOX & ROSE FOX
against
CHESTER A. ARTHUR. } Plea.

And the said defendant, Chester A. Arthur, by Stewart L. Woodford, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared, against the said defendant, and of this he puts himself upon the country; and the said plaintiffs do the like, etc.

STEWART L. WOODFORD,
United States Attorney, for Defendant.

TO CASLNEZ & L., Esq.,
Plaintiffs' Attorney.

17 (Indorsed:) 4968. U. S. circuit court. D. Fox & ano. against Chester A. Arthur. Plea. Stewart L. Woodford, United States attorney for defendant.

You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.

New York, Ap'l 4, 1877.

Yours, etc.,

STEWART L. WOODFORD,
United States Attorney for Defendant.

TO CASTNER & L.,
Plaintiffs' Attorney.

18 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 17th day of November, in the year of our Lord one thousand eight hundred and eighty.

Present, the honorable Nathaniel Shipman, judge.

DAVID FOX ET AL.
vs.
CHESTER A. ARTHUR. } 4968.

This case being still on trial, the jurors sworn in it are called, and sev-

erally answer to their names. Mr. Drake is further heard in opposition to the motion herein to direct a verdict for the defendant.

Mr. Merrick is heard in reply. The court directs the jury to find a verdict for the plaintiffs for the sum of $2,512.12.

The jury say that, by direction of the court, they find a verdict for the plaintiffs for the sum of two thousand five hundred and twelve dollars and twelve cents, and so say they all.

On motion of Mr. Merrick, ordered that the defendant have a
19 stay of proceedings for thirty days, within which to prepare and serve a bill of exceptions.

On like motion it is further ordered that a certificate of probable cause be entered herein.

(Endorsed:) C. C. of the U. S., S. D. of N. Y. David Fox et al. vs. C. A. Arthur. Certified transcript from minutes.

20 *Judgment.*

United States circuit court, southern district of New York.

DAVID FOX AND ROSE FOX
vs.
CHESTER A. ARTHUR, COLLECTOR OF THE PORT of New York.

The issues in this action having been brought on for trial before Mr. Judge Shipman and a jury, at a circuit court of the October term, 1880, and the issues having been tried, and a verdict for the plaintiffs having been duly rendered on the seventeenth day of November, 1880, and his costs having been adjusted at $46.85:

Now, on motion of J. William Love, attorney for plaintiffs, it is adjudged that the plaintiffs have judgment against the defendant upon the issues in this action, and that *he* recover the sum of $2,512.26, together with *his* taxed costs and interest on said verdict, which said costs and interest amount to the sum of one hundred and thirty-one dollars and eighty-seven cents, amounting in the aggregate to the sum of twenty-six hundred forty-four & $\frac{13}{100}$ dollars.

Judgment signed this 9th day of June, A. D. 1881.

J. M. DEUEL, *Clerk.*

21 (Indorsed:) United States circuit court. David Fox et al. vs. Chester A. Arthur. Judgment roll. J. W. Love, att'y for pl'ffs. Filed , 187 . Costs, $. U. S. circuit court. Filed Jun. 9, 1881. Joseph M. Deuel, clerk.

22 United States circuit court, southern district of New York.

DAVID FOX ET ANO.
vs.
CHESTER A. ARTHUR.
N , S. 4968.

Defendant's proposed bill of exceptions.

Afterwards, to wit, on the 16th day of December, 1880, at a stated term of the United States circuit court, begun and holden at the city of New

York, to wit, on the third Monday of October, 1880, before the honorable Nathaniel Shipman, district judge of the United States for the district of Connecticut, appointed to hold the said circuit court, according to the form of the statute in such case made and provided, the aforesaid issues so joined as between the said parties, as by the record more fully appears, come on to be tried by a jury duly empanneled and sworn for that purpose, the said plaintiffs being represented by J. William Love, esq., and the defendants by Albert B. Merrick, ass't U. S. attorney for the southern district of New York.

23 And in the course of the trial the counsel for the defendant did take and allege sundry exceptions to the ruling of the court, which exceptions are hereinafter severally set forth.

To sustain the issues on their part the plaintiffs proved that on or about the 13th day of January, 1875, they imported by the steamer Russia from a foreign country into the port of New York certain velours, composed of cow or calf hair, vegetable fiber, and cotton, an imitation of sealskin, and used for manufacturing hats and caps.

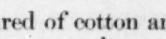
That the defendant, as collector of the port, exacted thereon a duty of fifty cents per pound, and, in addition thereto, thirty-five per centum ad valorem.

That plaintiffs made a due and timely protest against such classification and exaction, of which protest the following is a copy:

"NEW YORK, *Sept.* 14, 1875.

"Hon. CHESTER A. ARTHUR,
"*Collector of the Port:*

"SIR: We hereby protest against the liquidation of our entry per
24 Str. Russia from L'pool, duties paid February 15th, 1875.

"We claim that the goods contained in  1152–1157 of six cases are velours, manufactured of cotton and cow hair, cotton chief value, and that they do not contain any wool or worsted, and should therefore be admitted at a duty of thirty-five per cent. ad valorem, under act of June 6th, 1872, sec. 2, and not as liquidated in your department at 50c. per lb. and 35% ad valorem.

"We pay the amount exacted under compulsion in order to obtain possession of our goods, but claim to have the difference refunded to us.

"Respectfully,

"CHARLES FOX, SON & CO.,
"132 & 134 *South 5th Av.*

"Amount claimed, about $1,800. Consumption entry."

That thereupon and within due time plaintiffs appealed from the decision of the defendant to the Secretary of the Treasury, who affirmed said decision, and brought the action to recover the excess of duties alleged by them in their protest to have been exacted as aforesaid.

25 The evidence further showed that plaintiffs' goods, in the use to which they were put, and in appearance and material, resembled manufactures of goats' hair and cotton more nearly than any other article of commerce.

The goats' hair and cotton goods are also imitations of sealskin, and

all these goods of both kinds are frequently commercially called "seals," and are made to represent sealskin, and are used for the purposes for which sealskin is used. The component material of chief value of plaintiffs' goods was cow or calf hair, and not cotton.

The testimony being closed, and both parties having rested, defendant's counsel moved the court to direct a verdict for the defendant on the grounds—

1st. That the plaintiffs are not entitled to recover in this action, because it was undisputed upon the evidence that cotton was not the component material of chief value in the goods in question, and that was the ground of objection to the collector's action alleged in the protest.

2d. That it was undisputed on the evidence that plaintiffs' goods
26 in question more nearly resemble in appearance, material, and the use to which they were put, manufactures of goats' hair than any other article of commerce enumerated in the tariff laws, and were therefore properly classified for duty by the defendant.

The court then directed the jury to find a verdict for the plaintiffs for the sum of $2,512.26, that being for the purposes of this trial the admitted amount of excess, with interest, subject to adjustment by experts at the custom-house.

To this direction, but not to the form of the direction, defendant's counsel duly excepted, which exception was duly noted and allowed.

The jury thereupon rendered a verdict, as directed, for the sum of $2,512.26 in favor of the plaintiffs.

And inasmuch as the foregoing several matters of fact and of law, and the said several exceptions taken and made to the instructions and decisions of the court in the course of said trial do not appear upon the records of the trial, therefore, on the prayer of the said defendant,
27 by his counsel, the said judge has signed the foregoing as and for the bill of exceptions in this cause as of the 16th day of December, 1880, the day said verdict was rendered, and at the October term, 1880, of said court.

N. SHIPMAN, *Judge.* [L. S.]

(Endorsed:) U. S. circuit court, southern district of New York. David Fox & ano. versus Chester A. Arthur. Defendant's bill of exceptions. Stewart L. Woodford, United States attorney, att'y for def't. U. S. circuit court. Filed Jun' 6, 1881. Joseph M. Deuel, clerk.

Due service of a copy of the within is hereby admitted.
May 31, 1881.
28 J. W. LOVE, *Pl'ffs' Attorney.*

To J. W. LOVE, Esq.,
Attorney for Pl'ffs:

SIR: Please take notice that the within is a copy of the defendant's bill of exceptions in the case of David Fox et ono. vs. C. A. Arthur, N. Y., 4968, approved and settled by Hon. Nathaniel Shipman, the judge who presided at the trial of this case.

Yours, &c.,

S. L. WOODFORD,
U. S. Attorney, Att'y for Def't.

Dated New York, May 31, 1881.
To J. W. LOVE, Esqr.,
Attorney for Pl'ff.

29 *Affidavit of service of a copy of assignment of error.*

U. S. circuit court.

DAVID FOX & ANO.
against
CHESTER A. ARTHUR. } 4968.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Oliver B. Goldsmith, jr., being duly sworn, says he is a clerk in the office of Stewart L. Woodford, United States attorney; that on the 22 day of September, 1881, at 252 Broadway, New York City, about 1.45 p. m. he served a copy of the hereto annexed upon J. W. Love, attorney for plaintiffs in this action, by delivering said copy to and leaving the same with a man in the office of said J. W. Love.

And deponent further says he is over sixteen years of age.

OLIVER B. GOLDSMITH, JR.

Sworn to before me this 22d day of September, 1881.

THOMAS GREENWOOD,
Notary Public, No. , N. Y. City & County.

Assignment of error.

30 Supreme Court of the United States.

CHESTER A. ARTHUR, PLAINTIFF IN ERROR,
versus
DAVID FOX AND ROSE FOX, DEFENDANTS IN ERROR. } 4968.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol at Washington, comes the said plaintiff in error, by S. L. Woodford, his attorney, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid in form aforesaid given was given for the said defendants in error, against the said plaintiff in error, whereas, by the law of the land
31 the said judgment ought to have been given for the said plaintiff against the said defendants, and the said plaintiff prays that the judgment aforesaid, for the error aforesaid, and othererrors in the records and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c., &c., &c.

S. L. WOODFORD,
Attorney for Plaintiff in Error.

(Endorsed:) 4968. U. S. Supreme Court. Chester A. Arthur, plaintiff in error, versus David Fox & ano., assignment of error. Stewart L. Woodford, United States attorney for plaintiff in error. U. S. circuit court. Fil'd Sept. 28, 1881. Joseph M. Deuel, clerk.

32 UNITED STATES OF AMERICA, *ss:*

To David Fox and Rose Fox, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Chester A. Arthur is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error, mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated, September 19th, 1881.

SAM'L BLATCHFORD.

33 (Indorsed:) E. & A. 4968. U. S. Supreme Court. A. 344. Chester A. Arthur, plaintiff in error, against David Fox & ano., defendants in error. Citation. S. L. Woodford, attorney for pl'ff in error.

Due service of a copy of the within citation is hereby admitted this 20th day of September, 1881.

J. W. LOVE,
Attorney for defendants in error.

(Stamp:) U. S. circuit court. Filed Sep. 21, 1881. Joseph M. Deuel, clerk.

(Indorsement on cover:) No. 713. Chester A. Arthur, late collector of the port of New York, plaintiff in error, vs. David Fox and Rose Fox. S. New York, C. C. U. S. Filed October 15, 1881.

OFFICE SUPREME COURT U. S.
FILED
FEB 23 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

ARTHUR, COLLECTOR, &c.
vs.
FOX, &c.
No. 713.

BRIEF FOR THE COLLECTOR.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

ARTHUR, COLLECTOR, &c.
vs.
FOX, &c.
} No. 713.

BRIEF FOR THE COLLECTOR.

This record presents questions arising upon an importation of certain goods in February, 1875, the alleged error having occurred upon the trial of a suit brought to readjust the rate of duties exacted upon such importation.

The facts appear in the bill of exceptions upon pages 6, &c., of the record, and are substantially as follows:

The goods (folio 23), were "certain velours composed of cow or calf hair, vegetable fiber, and cotton, an imita-

tion of seal-skin, and used for manufacturing hats and caps."

The duty exacted was 50 cents per pound, and in addition 35 per centum ad valorem.

The protest claimed that the goods were "velours manufactured of cotton and cow hair, cotton chief value, and that they do not contain any wool or worsted, and should therefore be admitted at a duty of 35 per centum ad valorem under the act of June 6, 1872, sec. 2."

The evidence showed that the goods, in *use appearance* and *material*, "resembled manufactures of goats' hair and cotton more nearly than any other article of commerce." These latter goods are also imitations of seal-skin, and all goods of both kinds are frequently called, commercially, "seals." The component material of chief value in the goods was cow or calf hair, and not cotton.

Thereupon counsel for the defendants moved the court to direct a verdict for them, because—

1. Of the discrepancy between the goods as described in the protest and in the evidence.

2. That the goods more nearly *resembled* in point of use, &c., manufactures of goats' hair than any other dutiable article, and therefore had been properly classified.

But the court directed the jury to find for the plaintiffs. To this direction the defendant excepted, and—

It is now assigned for error.

The statutes whose application or interpretation is involved are as follows:

[Rev. Stats., sec. 2503.]

There shall be levied, collected, and paid upon all articles mentioned in the schedules contained in the next section, imported from foreign countries, the rates of duty which are by the schedules respectively prescribed: *Provided*, That on the goods, wares, and merchandise in this section enumerated and provided for, imported from foreign countries, there shall be levied, collected, and paid only ninety per centum of the several duties and rates of duty imposed by the said schedules upon said articles severally, that is to say:

On all manufactures of cotton of which cotton is the component part of chief value.

[Sec. 2504. Sched. A.]

* * * * *

Cotton braids, insertings, lace, trimming, or bobbinet, and all other manufactures of cotton, not otherwise provided for, thirty-five per centum ad valorem.

[Sec. 2504. Sched. L.]

* * * * *

Flannels, blankets, hats of wool, knit goods, balmorals, woolen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound, twenty cents per pound; valued at above forty cents per pound and not exceeding sixty cents per pound, thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound, forty cents per pound; valued at above eighty cents per pound, fifty cents per pound; and, in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem.

SEC. 2499. There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned;

And if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty;

And on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable.

Section 2503, above, contains the act of June 6, 1872, section 2, as referred to in the protests by the importers; and section 2499 reproduces the "similitude" provision of the act of 1842.

I submit that the issue between the collector and the importers, in the class of cases to which this belongs, is that which *is defined by whatever protest is made.*

Upon an *entry* being made, the collector comes to some general conclusion as to the class to which the goods belong, and announces such conclusion. If the importer objects thereto, it is his business to say so, *and also to direct the attention of the officers to the true class, as he understands it; i. e.*, if the goods be dutiable at all. He cannot, in this case, as it were, *plead the general issue* before the collector, and so put the government upon proof of its whole case, but he must virtually *pay money into court*, specifying the grounds upon which he does so. Thereupon the ordinary dispute betwixt him and the collector involves only the propriety of this latter proceeding. If the grounds which the importer suggested were not such as the collector ought to have acted upon, then the circumstance that those upon which the collector did act were also improper will not justify a recovery.

Collectors are quasi judicial officers; they are clothed with certain discretion, and a presumption of bona fides and general correctness attends their official determinations. There is in point of reason and the nature of things a ~~like~~ propriety in requiring parties to specify their objections to the current action of such officials, *and to stand or fall by such specification*, that ~~there is~~ where the current action in question is that of a nisi prius judge. As upon *error* the question upon the record is *not* simply whether the judgment below turned (say) upon proofs which arose from incompetent evidence admitted or from competent evidence excluded, *but* whether such evidence were also objected to upon the one hand or pressed upon the other *by proper arguments addressed at the time to the judge*,—so is the rule here. The protest, like a bill of exceptions, must show that the party complaining endeavored to influence the official action in question by specific reasons such as should have operated. An absence of such quality from the protest is an absence of all vitality.

Such I understand to be the doctrine in Davies *vs.* Arthur (96 U. S., 148).

To apply it here—

The collector concluded that a certain *velours composed of cow or calf hair, vegetable fiber and cotton, an imitation of seal skin, and used for manufacturing hats and caps* was subject, under the similitude clause of section 2499, to a certain duty. Against this the importers *protested*, assigning as a reason that the goods are "velours manufactured of cotton and cow hair, cotton chief value, and that they do not contain any wool or worsted, and should

therefore be admitted at a duty of 35 per cent. ad valorem, under act of June 6, 1872, section 2, and not as liquidated," &c.

The amount of this is that the importer asserted that the most valuable component of these goods was cotton, and that they were entitled to be admitted at 90 per cent. (act of 1872, sec. 2503, above) of a duty of 35 per centum ad valorem. In other words, he offered to pay a duty of 31½ per centum.

Without discussing here the accuracy of this assertion as to the proper rate of duty, *as compared with* that of the assertion by the collector, I submit that the importers cannot recover, because of the substantial mistake which they made in the counter *projet* set up in their protest.

The most valuable component in these goods was cow hair, and not cotton (*as they should have known*), so that in any case *the duty was* 35 *per cent., and not* 31½. (Arthur *vs.* Herman, 96 U. S., 141.) Then, even if the government should *admit*, as in Davies *vs.* Arthur (or if the *court* should consider), that the rate of duty *levied* was improper, but that the proper rate of duty was one differing as well from that levied as from that *tendered*, the importer could not recover.

It is to be remarked in this connection that the importation and protest in question (A. D. 1875) preceded the decision (October term, 1877) in Arthur *vs.* Herman. That case establishes the invalidity of the quasi tender in the present instance. The only distinction between the two cases seems to be that in the former the protest made no misrepresentation of fact as to the component of chief value in the goods, contending in point of law that even if cotton were

not chief value the 90 per cent. provision of 1872 applied; whereas here the rule of law is admitted, the facts as above in the mean time being *misstated*.

II. But even if the rule in *Davies' case* or that in *Herman's case*, were out of the importers' way, the true rule to be applied here is *practically* that contained in the first or *similitude* clause of section 2499, above, and not (at least in the way in which the importers are understood to contend) the rule laid down in the third clause of that section.

It is ~~so~~ submitted that under our customs legislation the existence of *three* classes of goods is assumed: 1, goods expressly dutiable; 2, goods expressly free, and, 3, goods which presumably the legislature admits to have escaped its direct notice, or those which it anticipates in some general way as soon to come into existence and be within the policy of certain express customs provisions. These last therefore, are provided for under some quasi *residuary* clause more or less general. That an article is not expressly mentioned as dutiable does not leave it free.

Of these *residuary* clauses, that contained in section 2499, which has survived for forty years of so much change of tariff legislation, is perhaps the most general.

Section 2499 speaks of "articles" and also of "materials." In the first two clauses the reference is to "material," in the singular number, and in the third to "two or more materials."

From this it is argued upon behalf of the importers that the two first clauses include only articles made of one material, whilst articles composed of more than one (where within the section at all) are within the third clause only.

Without conceding the truth of this proposition under all circumstances, it may be admitted for the sake of the present argument,—subject to the proviso that *in order to settle a rate under the third clause, a preliminary question may have to be referred for decision to one of the clauses preceding.*

For example, any compound article in question may be made up of things which are themselves "articles" within one or other of the former clauses. The words "material" and "article" are not terms of art. Many a "material" is itself an "*article enumerated in this Title*," to quote from the first clause. For instance, the dutiable article "clothing ready made" (Rev. Stat., p. 474) may be made of the *material* "cottonade," this in its turn being a dutiable *article* (p. 460), made of the *material* "cotton thread," which in like turn is a dutiable *article* (p. 461), whose *material* is "cotton," which, in the last place, is a free *article* (p. 484).

Therefore, if some compound article which comes within the third clause is composed of one or more materials which within the general Title are themselves in turn articles the rate of duty upon one or more of which can be determined by only one of the former clauses, it remains that before clause three can be applied a preliminary ascertainment may have to be made under a clause preceding.

The goods at present in question will serve for illustration. "Velours, composed of cow or calf hair, vegetable fiber, and cotton, an imitation of seal-skin, and used for manufacturing hats and caps," when treated under clause three (disregarding the element *vegetable fiber*, which cuts no figure in this inquiry), may in strict grammar be referred to the *materials* "cow or calf hair" and "cotton." Both of these are *free;* but the conclusion that therefore the velours is free, is a reduction *ad absurdum* of the supposition that in revenue reason the *materials* are the *raw* materials to which grammar may point, instead of such materials advanced by one or more stages of manufacture. It would require express words to exempt from duty an article composed of several materials in a state of manufacture, if articles made of each of such materials taken *alone* were dutiable. Whether this velours is made of materials which previously to the commencement of the process which results in *velours*, are a manufacture of cow hair and a manufacture of cotton, respectively, or whether the manufacture of the *cow hair* and *cotton* commences only simultaneously with that of the article into which they are compounded, the customs policy making distinction betwixt raw materials and materials which have undergone manufacture applies all the same. In either case equally, at the time of importation both of those materials have undergone a process by which they are *raw* no longer.

Regarding the velours, then, as consisting of manufactured cow hair and manufactured cotton, what is the result of applying clause three?

In the first place, the collector would have to decide which of these component materials is "assessed at the highest rate."

In order to do this he would have to pass upon the *character* or *stage* of the manufacture in question. He would then examine the *direct* provisions of the customs acts to ascertain whether both such *materials* were included therein. If only one, or neither, was so included, he would examine the question in the light of the first of the clauses now under consideration, and if such *highest rate* was fixed by one of them, it would as well determine the question under clause three, *i. e.*, that of the duty upon the compound article.

To proceed:

It is assumed by the importers that one material here is that *manufacture of cotton* mentioned in the last paragraph of Schedule L (p. 461), and is dutiable at 35 per centum ad valorem. If that be granted, how does it appear that such material is that *assessed highest?* Or in other words, what is the rate upon the other component,—the manufacture of *cow hair?*

This latter question is one requiring for its solution, a reference to clause *one* above. As *manufactures of cow hair* are not *directly* dutiable, a question arises as to their *similitude* in the particular stage which they have reached. Upon this point the case states nothing upon the part of the importers to impeach the decision of the collector, which in so far therefore is to be affirmed whenever it comes in question. It is, however, stated upon the part of the government that as regards *use*, &c., the manufacture

of cow hair in question is of such nature that when united with a certain manufacture of cotton (*i. e.*, as to its *use* in manufacturing) it produces exactly the effect of *goats' hair*, ~~and produces~~ an imitation of seal-skin. Upon this argument (no other similitude having been suggested for this material by the importers, and indeed no other rate of duty of any sort), the collector may have referred the cow hair element to the last paragraph of the Revised Statutes upon page 471:

> All manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, not otherwise provided for, valued at above eighty cents per pound, fifty cents per pound, and, in addition thereto, thirty-five per centum ad valorem.

Considering the item of cow-hair-manufactured independently, he may have compared it with a manufacture "wholly" of goat's-hair, and, as regards "the use to which it may be applied," may have decided that the former resembled the latter.

It is submitted in the present state of the record that nothing appears to contradict such conclusion, and also that this controls the rate of duty applicable to the *velours*, and affirms the action of the collector.

It may also be submitted, as another and distinct variation from the proposition suggested by the importers (*i. e.* that the duty upon all compound articles is to be ascertained under clause *three*), that this does not apply to such compound articles as have a similitude to other compounds treated in other parts of "this title," *directly*, and at same

time specifically, *i. e.* as *units*. For instance, compounds consisting *partly* of goat's hair are treated *directly* and as *units* in the clause just above quoted. I submit that some newly manufactured compound which has a *similitude* to that compound would be treated more intelligently by being referred thereto than by having its parts analyzed, chemically or otherwise, and thereupon being determined as regards *duty* by clause *three*.

Upon reflection, no objection to this rule of construction occurs, except such *analysis* should show the existence of some *material* which it is the policy of the customs legislation to assess at a higher rate than would follow from this *reference of compounds indirectly operated upon to their similitude to compounds directly operated upon*. Inasmuch as it seems to be a cardinal rule for the interpretation of customs statutes that *material* is not to be assessed at higher rates than *manufactures*, it might be a sort of *reductio ad absurdum* to show in any case that clause *one* resulted in assessing a *lower* duty than would have followed under clause *three*. But where the result is *vice versa*, (*i. e.*, a *higher* rate under clause *one* than under clause *three*,) the *similitude* solution is to be preferred, inasmuch as it refers any *stage* of manufacture in question to the like stage as determined; the operation of clause three (*i. e.*, the ascertainment of a rate of duty for a *manufacture* by referring it to the rate upon a *material* therein) being in reason applicable only where all rules more in accordance with the general policy of tariffs may be inapplicable.

If the conjoint products of Alabama cotton and an Alderney cow lose their original homely aspect, and result in

such an imitation of the product of an Alaska seal as is capable of imposing upon the frequenters of the market quite as much as are the conjoint products of the cotton in question and an Alpaca, it seems that commercial and revenue purposes would be answered more fully by treating the first article accordingly than by picking it into pieces to the original cotton and hair, and deciding upon it so.

Upon the whole, I hope to be understood as having submitted that the court below erred in directing a verdict for the defendants in error, for the reason that the evidence showed that either,—

1. The protest was faulty in describing the goods *as cotton chief value*, this fault causing the duty tendered by the importers to be too small: or,

2. Considering the article as compounded of two or more materials, it is the *cow hair* and not the *cotton* that must determine the rate of duty, and so the exaction by the collector was substantially correct: or,

3. Supposing the article not to be one the duty upon which is to be determined by the elements into which it may be reduced, but to be for revenue purposes a *simple* article, because *like* other articles of the same character which the tariff act treats directly *as units*, then the action of the collector was *formally*, as well as substantially, correct.

S. F. PHILLIPS,
Solicitor-General.

OFFICE SUPREME COURT U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

ARTHUR
v.
FOX et al.

No. 713.

BRIEF FOR DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1882.

ARTHUR. Collector,
vs.
FOX ET ALS. } No. 713.

Brief for Defendants in Error.

STATEMENT.

Early in 1875 Chas. Fox, Son & Co. imported into New York certain imitations of seal-skins, then and ever since a common subject of importation.

They were manufactured of cow-hair, vegetable fibre and cotton.

Commercially they were known as velours.

They were used for manufacturing hats and caps.

In the use to which they were put, and in appearance and material, they resembled manufactures of goat's hair and cotton more nearly than any other article of commerce. The goat's hair and cotton goods are also imitations of seal-skin, and all these goods, of both kinds, are frequently commercially called "seals," and are used for the purposes for which seal-skin is used. The component material of chief value was cow or calf-hair, and not cotton. (Record, 7, 8).

The collector assessed duty thereon at fifty cents a pound and 35% *ad valorem* (*Id.*, 7).

The merchants seasonably protested, claiming that their goods were "velours, manufactured of

cotton and cow hair, cotton chief value, and that they do not contain any wool or worsted and should therefore be admitted at a duty of 35% *ad valorem*, under act of June 6, 1872, sec. 2, and not as liquidated," &c. (*Ib.*)

The government asked for a verdict upon two grounds:

1st. That the plaintiffs are not entitled to recover in this action, because it was undisputed upon the evidence that cotton was not the component material of chief value in the goods in question, and that was the ground of objection to the collector's action alleged in the protest.

2d. That it was undisputed on the evidence that plaintiff's goods in question more nearly resemble in appearance, material and the use to which they were put, manufactures of goats hair than any other article of commerce enumerated in the tariff laws, and were therefore properly classified for duty by the defendant" (Record, 8.)

The Court refused this request and directed a verdict for the plaintiff below (*Ib.*).

Brief.

I. The similitude clause first appears as the second section of the act of Sept. 11, 1841, and next as the twentieth section of the tariff of 1842, in the same terms as used in the revision. 5 Stats., 464, § 2, and 565 § 20.

"The provisions of that section" have thus become "a permanent part of the customs duty system of the country * * unaffected by any of the later tariff acts, and were in force when the duty in question was collected."

Smythe v. Fiske, 23 Wallace, 381, bottom.

"In the first place, then, it must be observed that the twentieth section of the act of 1842, does not impose any *particular rate of duty* upon imports. It was designed to afford rules to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws."

Stewart v. Maxwell, 16 Howard, 160.

"We are obliged to look at the whole existing system, and consider the nature of the subject matter of the enactment under consideration, in its relations to that system. * * * If this act of 1846 had in terms enacted the twentieth section of the act of 1842 [as the revision does] its provisions would not thereby have been rendered repugnant or conflicting. *This section would then only have afforded a rule by which it could be determined that certain articles did substantially belong to, and were to be reckoned as coming under a particular schedule.*" *Ib. et seq.*

Ross v. Peaslee, 2 Curtis Cir. Ct., 501.

Meeting the argument of counsel in Stuart vs. Maxwell, that the similitude clause in the act of

1842 was repealed by the act of 1846, because the third section of the latter subjected to twenty per cent duty all goods, "not specially provided for in *this* act," this Court say: "In the first place it may be justly said, that if the act of 1846 has specially provided for manufactures of cotton and has, at the same time, left in force a rule of law, which enacts that all manufactures of which cotton is a component part, shall be deemed to be manufactures of cotton, if not otherwise provided for, *it has in effect provided for the latter.*" *Id.*, 162.

Thus this Court assented to the reasoning of Nelson, J., at Circuit, in Morlot vs. Lawrence, 1 Blatch., 608.

It was followed in construing su bsequent legislation.

Smythe v. Fiske, 23 Wall., 381, bot., cited *supra.*

Examining Title XXXIII. of the Rev. Stats., Sects. 2491 to 2516, inclusive, prescribing "Duties upon Imports", we find "the whole existing system" to be based, primarily, upon a classification for duty according to the *material* of which the importation is composed; arranged not merely with a view to revenue, but also so as to protect our own industries.

Thus, the Schedules of Sec. 2504, containing the *rates* of duty, are entitled according to the material of which each treats; *e. g.:* "Schedule A.—Cotton and Cotton Goods," commencing with "countable" cottons; then enumerating many particular articles; and concluding with, "all other manufactures of cotton, not otherwise provided for; thirty-five per centum ad valorem"—which is the rate affixed to all articles for wear, made of cotton, except those whose threads are to be counted to ascertain the duty. "Schedule B.—Earths and Earthen Wares." "Schedule C.—Hemp, Jute and Flax Goods." "Schedule D.—Liquors." "Schedule E.—Metals." "Schedule F.—Provisions." "Schedule G.—Sug-

ars." "Schedule H.—Silks and Silk Goods." "Schedule I.—Spices." "Schedule J.—Tobacco." "Schedule K.—Wood." "Schedule L.—Wool and Woolen Goods." "Schedule M.—Sundries." The only products of the loom named in this final schedule of dutiable articles are:—"Clothing, ready made, and wearing apparel of every description, of *whatever material* composed, except wool, silk and linen," &c. * * * * *thirty-five per centum* ad valorem:"—"Corsets, or manufactured cloth, woven or made in patterns of such size, shape and form or cut in such manner as to be fit for corsets, when valued at six dollars per dozen or less, $2 per dozen; when valued over $6 per dozen, *thirty five per centum ad valorem:*"—"Embroidery.—Manufactures of cotton, linen or silk, if embroidered," etc. * * * * "*thirty-five per centum* ad valorem:"—

It also provides for;—

"*Fur*, articles made of:—caps, hats, muffs, tippets of fur, and *all other manufactures of fur*, or of which fur shall be a component material; *thirty-five per centum* ad valorem."

"Hair.—Bracelets," etc., "composed of hair, or of which hair is a component material, *thirty-five per centum* ad valorem;" * * * * * "and *all other manufactures of hair*, not otherwise provided for, *thirty per centum* ad valorem:"—

"Hats, &c., materials for.—Braids. plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for *making* or ornamenting *hats*, bonnets and hoods, composed of straw, chip, grass, palm-leaf, willow, *or any other vegetable substance*, or of *hair*, whalebone, or other material, not otherwise provided for, *thirty per centum* ad valorem."

"Hatter's plush, composed of silk and cotton, but of which cotton is the component material of chief value, *twenty-five per centum* ad valorem:"—"Lastings," etc., "or other manufactures of cloth woven or made in patterns," etc., "to be fit for buttons exclusively," etc., "*ten per centum* ad valorem:"—

"Velvets, when printed or painted, *thirty-five per centum* ad valorem."

This schedule concludes the enumeration of dutiable charges with "Webbing, composed of cotton, flax, or any other materials, not otherwise provided for, *thirty-five per centum* ad valorem."

II.

To apply, methodically, the foregoing principles of law to the established facts of this case, we will examine the collector's claims to a verdict in the reverse order of that in which they are placed upon the record [page 8]; because upon the sufficiency of the second depends the correctness of the collector's action, still followed by his successors in office as to all like importations, whereas the phraseology of the protest is peculiar to this individual case.

The second ground (here first considered) upon which the district attorney based his claim for a verdict was "That it was *undisputed on the evidence* that plaintiff's goods in question more nearly resemble in appearance, *material*, and the use to which they were put, *manufactures of goat's hair* than any other article of commerce enumerated in the tariff laws, and were therefore properly classified for duty by the defendant." (Record, 8; folio 26.)

The facts stated do not sustain the claim.

It is found that "plaintiff's goods, in the use to which they were put, and in appearance and material, resembled manufactures of goat's hair *and cotton* [not manufactures of goat's hair alone] more nearly than any other article of commerce." (Record, 7, bottom.)

Both the importations and the goat's hair and cotton goods represent seal-skin, are imitations of it,

and are used for the same purposes that seal-skin is; yet neither of these imitations are assessed at the thirty per cent. rate imposed upon manufactures of fur. The Collector assessed our goods at 50 cents a pound and 35%; apparently, because they resembled something (duties at that rate) which also resembled something else; pursuing as with the shadow of a shade.

Upon the ground which the district attorney rested this claim for a verdict, then, he was clearly not entitled to it. Was he so entitled upon the facts stated? or do they justify that which was entered?

We maintain the correctness of the verdict, because these goods are, in legal effect (as declared by the cases hereinbefore cited) enumerated in Schedule A as manufactures of cotton.

They contain three substances; *i. e.*, cotton, other vegetable fibre, and cow-hair. All three of these materials are mentioned in the tariff, as before indicated; "all other manufactures of hair," at thirty per centum ad valorem; "hats, materials for, * * * of any other vegetable substance, or of hair," etc., at the same rate and "all other manufactures of cotton, not otherwise provided for, thirty-five per centum ad valorem."

Cotton being the material bearing the highest rate, these goods must be subjected thereto, in obedience to the last sentence of the similitude section of the tariff.

The difference between us is, that the collector claims, under the first sentence of the section, to rest his assessment upon a *similarity* of material, &c., while we rely, under the last sentence, upon *identity*. Nullum simile est idem.

In terms already quoted, this Court has declared that, where an act "has specially provided for manufactures of cotton, and has at the same time left in force a rule of law which enacts that all manufactures of which cotton is a component part shall be

deemed to be manufactures of cotton, if not otherwise provided for, it has in effect provided for the latter."

16 Howard, 162.

The statute then referred to by the Court was the act of July 30, 1846, c. 74, which contained only this reference to cotton goods not designated by some specific name (as "cotton laces," &c.) viz: "manufactures composed *wholly* of cotton, not otherwise provided for," (9 Stats, 46, middle). Yet it was there ruled that articles of which linen was one material and cotton the other ("a component part," as the Court say—a phrase not found, in connection with cotton in this statute of 1846) were, by force of the similitude clause of the act of 1842, dutiable under this Schedule D, (of the act of 1846) as if, in legal effect, "composed wholly of cotton." Compare 16 Howard, page 159 with page 162.

Of this similitude section, this Court—followed by the Court below, in the case at bar—has held:

It applies only to non-enumerated articles. Arthur v. Unkart, 96 U. S., 120, near bottom, citing Stuart v. Maxwell, *ubi supra;* Arthur v. Sussfield, *Id.*, 128-9.

So applied, it brings articles made *partly* of an enumerated substance within the statutory clause applicable to things made *entirely* of that substance. Cases cited *supra.*

In Murphy vs. Arnson, 96 U. S., 131, the components of the importation (nitro-benzole) were benzole and nitric acid; the former constituent being dutiable at forty cents a pound and the latter (if pure) at ten per centum; or "if not chemically pure," free. The commercial designation of the article was "oil of myrbane" or "artificial oil of bitter almonds," and was employed (like the genuine oil of bitter almonds) in perfuming and flavoring. As a marketable commodity, it resembled, more than anything else, the essential oils, for which it was used as a cheaper substitute. The collector as-

sessed it at fifty per cent., as an essential oil; vindicating his exaction upon the ground that this was the enumerated article to which it bore the strongest resemblance in its uses. This Court sustained the ruling below, favorable to the claim of the importers, that the true duty was forty cents a pound, the highest rate paid upon any of the ingredients of which nitro-benzole is made. 96 U. S., 131, *et seq.*

The duty upon all essential oils,—other than those obtained from bay-leaves, cubebs, lemons and orange,—is fixed at the uniform rate of fifty per centum ad valorem (R. S., § 2504, Sched. M., p. 482, 1st ed., and p. 478, 2d ed.). Thus "essential oils" are treated as a distinct subject of duty, regardless of the plant from which they are extracted.

This designation is certainly far more specific than that which the Government seeks to apply to our goods. Recurring to a consideration which we deem paramount, it is to be observed that the present importations do not bear resemblance to any single *article* specifically enumerated; but only to things in part made of a *material* mentioned, to wit: goat's hair; while these very goods of ours are themselves made of materials which are enumerated. In *material*, they are composed of two substances, one dutiable at thirty-five per cent., the other at thirty. In appearance and *use*, in common with goods of goat's hair and cotton, they resemble sealskin, dutiable at thirty per cent. All other "sundries," named in Schedule M, made of cotton, or of hair, and the like, are dutiable at or below thirty-five per centum.

The true construction of the clause in question, (according to the decisions) is, that it *applies only to a non-enumerated article;* if that article is made of materials *any* of which are mentioned in the statute, it is dutiable at the highest rate imposed upon *either* of its constituents; IF NEITHER THE ARTICLE NOR ANY OF ITS COMPONENT MATERIALS IS

DESIGNATED IN THE TARIFF, then (and then only) IT IS DUTIABLE ACCORDING TO ITS SIMILITUDE IN MATERIAL, QUALITY, TEXTURE OR USE; and if, in these particulars, it equally resembles two or more enumerated articles, it pays the highest duty placed upon any of such like articles.

Thus, in Stuart vs. Maxwell, the importation was of goods made of cotton and linen. The tariff of July 30, 1846, was then in force (9 Stats., 42). Schedule D. required "manufactures composed *wholly* of cotton" to pay twenty-five per centum, (*Id.*,46) but fixed no rate upon articles made *partly* of cotton; which theretofore—under the tariff of Aug. 30, 1842,—had paid, according to the "second" item of Sec. 2, placing "On all manufactures of cotton, *or of which cotton shall be a component part*, not otherwise specified, a duty of thirty per centum *ad valorem*" (5 Stats., 549). This Court held that—though the later act repealed this thirty per cent. provision of the earlier, the similitute section of the Act of 1842 was not repealed; and that, by force of it, goods composed of cotton and linen were dutiable at the twenty-five per cent. rate established by Schedule D. for "manufactures composed *wholly* of cotton"—"linens of all kinds" paying twenty per cent., under Schedule E.—instead of the twenty per cent. levied upon "unenumerated articles" by Section 3 of the Act of 1846, 16 Howard, 150, 158 *et seq.*

THE PRECISE QUESTION NOW PRESENTED HAS BEEN ONCE DETERMINED BY THIS COURT, in conformity with the present claim of these importers, Fox & Company; nevertheless they are compelled to litigate it again in this forum because subordinate customs officials refuse to conform their action to that decision.

Arthur vs. Herman, 96 U. S., 141.

It will be observed that the Solicitor-General, at

the top of page 8 of his brief, does not fully and accurately state our position; perhaps through lack of clearness in our statement of it to him.

We do not say that the first two clauses relate *exclusively* to an article made of a single material; but that they affect only non-enumerated articles, made of non-enumerated material; so that resemblance *must* be resorted to; and, in case of equal likeness to two enumerated things, it pays the duty placed upon the highest; while the third clause covers those *non-enumerated articles* made of two or more *enumerated materials.*

The reasoning of the Solicitor-General upon the succeeding pages of his brief (pp. 8 to 11) appear to us to be fallacious; at least, in the application of it to this case, it is founded upon the misapprehension that the tariff laws impose *no* duty upon manufactures of hair.

Among the "Sundries" enumerated in R. S., Sec. 2509, "Schedule M," we find;—"Hair-cloth, known as 'crinoline cloth' and *all other manufactures of hair*, not otherwise provided for, thirty per centum ad valorem." R. S., 2d ed., p. 476, near bottom; 1st ed., p. 480, near botton.

The Solicitor-General's construction, in effect, nullifies the final provision of the several tariff Schedules. Thus, Schedule A, after an enumeration of very many cotton fabrics, concludes with the clause: "Cotton braids, insertings, lace, trimming or bobbinet *and all other manufactures of cotton*," &c.; Schedule B, "and all manufactures of glass," &c.; Schedule C, all other manufactures of hemp, jute, &c.; Schedule, H, manufactures of silk, etc., etc., etc.

Clearly, these clauses are not meant to embrace only goods which have advanced but a single step in the process of manufacture. Whatever may be the stage of manufacture, if the material manufactured be cotton, or glass, or silk, etc., etc., they are dutiable under the appropriate provision.

The same is true of the similitude clause. If the importation be a non-enumerated manufactured article, it is dutiable at the highest rate at which the *unspecified* manufactures of either of its components is assessed. This is the only construction that will give *any* effect to this clause.

In the act of making these goods, the component materials underwent a process of manufacture; and the result was a manufacture of cotton and a manufacture of hair; irrespective of the question whether either had been before subjected to treatment.

III.

The first ground upon which the district attorney asked that a verdict for the defendant below should be directed was:

"1st. That the plaintiffs are not entitled to recover in this action, because it was undisputed upon the evidence that cotton was not the component of chief value in the goods in question, and that was the ground of objection to the collector's action alleged in the protest" (Record, 8, near top).

That this is not a correct or fair statement of the purport of the protest is obvious from a perusal of it in connection with the statute which it cites.

It says that the goods are "manufactured of cotton and cow-hair, cotton chief value, and that they *do not contain any wool* or worsted, and should *therefore* be admitted at a duty of thirty-five per centum ad valorem, under the act of June 6th, 1872, sec. 2, and not as liquidated in your department at 50 c. per lb. and 35 % ad valorem" (Record, 7).

There was no dispute as to the statute under which the ad valorem duty was to be imposed. Both parties conceded that the similitude section was applicable; the dispute was as to the appropriate

clause of this section. To this provision of law the minds of both parties were directed. The case of Arthur v. Herman, 96 U. S., 141 (as well as the one at bar), shows that the similitude clause was that which was conceded to apply to these importations; and that the Custom House formerly applied this last clause. Of course, a change to the higher rate would be challenged. But there had been for three years another subject of controversy, relative to the duty upon these goods; to wit, whether or not they were entitled to the reduction of ten per cent. allowed upon certain manufactures by the second section of the act of June 6, 1872 (17 Stats, 231).

Reference to the records of this Court for the October Term, 1877, will show that, when Charles Fox, Son & Co., protested as to these goods (Sept. 14, 1875) the suit of Herman v. Arthur was awaiting a new trial which had been granted and was had in December, 1875, resulting in a verdict for the plaintiffs; directed upon the ground that they *were* entitled to the benefit of the second section of the Act of June 6, 1872. This Court reversed the judgment entered upon this verdict, 96 U. S., 141. During the pendency of this test suit, however, all importers of these goods protested that they should have this reduction. In discussing *this* question, the fact whether the cotton in the fabric was or was not its "chief value" was of vital importance, as the opinion in 96 U. S., 141 to 143, shows. It was of no sort of consequence, as affecting the present question. Thus it is obvious that the words "cotton, chief value," in our protest only have reference to the second section of the Act of June 6, 1872, therein mentioned, and were inserted to aid in securing the ten per cent. deduction it allows.

Before this cause was tried at Circuit, your decision in Arthur v. Herman, 96 U. S., 141, had eliminated that question from our litigation, and made those three words in our protest of no importance.

In reply to the Solicitor General upon this point (Brief, 4 to 7) we would observe:—

The importers did, literally, pay in their money. At the same time, in order to get a portion of it back, they protested that a specified part of it (to wit, the specific duty of fifty cents a pound) was improperly exacted, under an erroneous classification; and, secondly, that one-tenth of the ad valorem duty was improperly exacted, for a *different* reason, to wit, because cotton was the material of chief value in the goods.

It does not seem possible to us that, where the Collector exacts a higher duty than the merchant thinks right, basing different items of his exaction upon two separate propositions, both of which the merchant contests, the government can properly retain the whole sum extorted if the importer err as to that point which involves the lesser portion of the sum exacted.

Accepting the Solicitor-General's comparison of a merchant's protest to a lawyer's technical bill of exceptions; in the latter, it is sufficient if any one of the errors of law assigned be established. The lawyer does not have to sustain every point raised, under penalty of having the judgment affirmed.

Applying the rule of this Court, cited against us, as laid down in 96 U. S., 151–2, there can be no doubt that our protest is sufficient to enable us to recover, if otherwise entitled. In the case referred to the Court say:—"Technical precision is not required; but the objections must be so distinct and specific as, when *fairly* construed, to show that the objection taken at the trial was fairly in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts," etc.

Davies vs. Arthur, 96 U. S., 151-2, and citations.

In the present case, there is no question—as there was in the above-cited cases—that the controversy between the parties at the date of the protest

was precisely that raised at the trial and here discussed.

The substance of the protest is this:—The importers say;—our goods are manufactured of cow-hair and cotton; not containing any wool or worsted; therefore, we claim to enter them at the ad valorem rate of 35 %, without the addition of the specific duty; and we also claim the benefit of the horizontal reduction granted by the second section of the act of June 6, 1872, because cotton is the component of chief value.

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